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OF COUNSEL  
THOMAS F. WOODS

July 28, 1998

RECEIVED-FPSC  
98 JUL 28 PM 1:56  
RECORDS AND  
REPORTING

HAND DELIVERY

Blanca S. Bayo, Director  
Division of Records & Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 970365-GU  
Complaint of Mother's Kitchen Ltd. against Florida Public  
Utilities Company regarding refusal or discontinuance of  
service.

Dear Ms. Bayo:

Enclosed, for filing in the above-referenced case, are an  
original and fifteen (15) copies of Florida Public Utilities  
Company's Motion to Strike Petitioners' Response.

Please acknowledge receipt of the foregoing by stamping the  
enclosed extra copy of this letter and returning same to my  
attention.

Thank you.

Sincerely,

*Kathryn G.W. Cowdery*  
Kathryn G.W. Cowdery

RECEIVED & FILED  
*[Signature]*  
FPSC-BUREAU OF RECORDS

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF Plescow
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG Makin
- LEG Elias KGWC/l dv Enclosures
- LIN \_\_\_\_\_
- OPC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC 1
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE

07928 JUL 28 98

FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint of Mother's Kitchen Ltd. against Florida Public Utilities Company regarding refusal or discontinuance of service.

Docket No. 970365-GU

**MOTION TO STRIKE PETITIONERS' RESPONSE**

COMES NOW FLORIDA PUBLIC UTILITIES COMPANY (FPUC), by and through its undersigned counsel, and hereby moves the Commission to strike "Mother's Kitchen Ltd. Response to Florida Public Utilities' Motion to Strike of July 2, 1998," as 1) untimely filed, 2) containing documents and references to documents not in the record of the hearing before the Administrative Law Judge (ALJ), and 3) as arguing additional exceptions the ALJ's Recommended Order on the merits of the case. Respondent submits the following grounds in support hereof:

**"Mother's Kitchen Ltd. Response to Florida Public Utilities' Motion to Strike of July 2, 1998" must be struck as untimely**

1. On July 2, 1998, Respondent FPUC served and filed its Motion to Strike Petitioners' Exceptions to the Recommended Order as untimely filed.

2. Pursuant to Fla. Admin. Code R. 28-106.204, any response to Respondent's July 2, Motion to Strike should have been filed by July 14, 1998 (i.e., 7 days after service plus 5 days since service was by U.S. mail). See In re: Complaint of Tahitian Gardens Condominium Assoc., Inc., Against Aloha Utilities etc., Docket No. 97192-WS, "Order Granting, in part, Motion for Extension of Time,"

DOCUMENT NUMBER-DATE

07928 JUL 28 88

FPSC-RECORDS/REPORTING

97 FPSC 10:188 (requiring adherence to the 12 day time period for filing a response to a motion to dismiss or strike pursuant to Rules 25-22.037(2) and 25-22.028(4), F.A.C.); and In Re: Joint Petition of Citrus County et. al., Docket No. 930647-WS, Order Dismissing Joint Petition, 93 FPSC 9:659 (Where the utility timely filed a motion to dismiss a petition, this Commission struck the Petitioners' response to the motion to dismiss as untimely pursuant to Rule 25-22.037(2), F.A.C.).

3. Petitioners did not file their response until July 24, 1998, and the response is therefore untimely.

4. Petitioners have not offered any proof of excusable neglect for their untimely filing of their response to Respondent's Motion to Strike, and therefore their response must be stricken. See Hamilton County Bd. of County Commrs. v. State of Florida, Dept. of Env'tl. Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991).

5. Petitioners are represented by a qualified representative who represented by sworn affidavit, pursuant to administrative rule requirement, that he had the ability to conform to the rules of the PSC in this matter. Qualified representatives must conduct themselves pursuant to the standards of conduct set forth in Fla. Admin. Code R. 28-106.107.

6. Rule 28-206.104(f) requires that a certificate of service shall accompany each document filed with the Public Service Commission. As provided for in the Rules of Civil Procedure, a

certificate of service is one party's attestation and certification that a particular filing was sent to the other party on a particular day. However, once again, although the certificate of service indicates service on July 18, 1998, the post-mark on the envelope in which the response was received by the undersigned is stamped July 21 and July 22, 1998.

**Petitioners' response must be struck as an attempt to reargue or argue new exceptions to the ALJ's Recommended Order**

7. In paragraph 5 of Petitioners' Response, Petitioners begin by stating that Respondent's Motion to Strike: "alleges absence of any offer of proof of excusable neglect along with a citation of Hamilton." However, Petitioners proceed to reargue merits of the case and do not make any reference whatsoever to why their exceptions to the recommended order were untimely filed.

8. Paragraphs 5 - 9 of Petitioners' response which argue the merits of the case rather than being responsive to Respondent's Motion to Strike Petitioners' exceptions to the recommended order should be stricken. These arguments have or should have been raised as exceptions to the recommended order, to which Respondent has already filed its response pursuant to rule. To allow further argument on exceptions at this time would be prejudicial to Respondent, and would allow Petitioners an unauthorized second argument taking exception to the ALJ's Recommended Order. See §120.57(1)(i), Fla. Stat. and Fla. Admin. Code R. 28-106.217.

9. Respondent objects and disagrees with the substance of

paragraphs 5 - 9 of the Petitioners' response, which, among other things, is consistently contrary to the record, and advocates action by the Commission which would be contrary to law. If the Commission does not strike paragraphs 5 - 9, Respondent requests that the Commission allow it an additional 10 days in which to respond to these new exceptions.

**Petitioners' response should be stricken because it contains reference to and attachment of irrelevant, nonrecord documents**

10. Petitioners' response should be stricken because it contains reference to and attachment of irrelevant documents not entered into the record of the hearing below. Only evidence of record may be considered by the agency in considering the ALJ's recommended order. Section 120.57(1)(f) and (h), Fla. Stat. (1997).

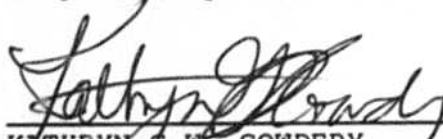
11. All of the documents attached to Petitioners' response should be stricken because they are not part of the record in this case, except the document identified as "Resp. '33,'" consisting of three pages (which is Respondent's Exhibit 33 from the hearing), and the document marked "Resp. Ex. '32,'" pages 1 of 31, and 2 of 31 (which consists of the first 2 of 31 pages of Respondent's Exhibit 32 from hearing), except that the Commission should strike the dark black handwritten notations written sideways across page 1 of 31, which do not appear on Respondent's Exhibit 32. 1 2 . The references to the documents not of record which are identified in paragraph "11" above, located in Petitioners' response

paragraphs 5 - 9, must be stricken.

WHEREFORE, Florida Public Utilities Company respectfully requests that the Commission strike Petitioners' response for the reasons set forth herein.

Dated this 28th day of July, 1998.

Respectfully submitted,

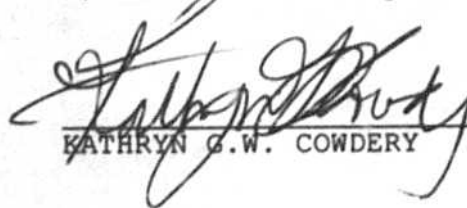


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Attorneys for FLORIDA PUBLIC  
UTILITIES COMPANY

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the forgoing has been sent, via U.S. Mail, to: Anthony Brooks, II, Qualified Representative, P.O. Box 1363, Sanford, Florida, 32772, and via Hand Delivery to: Bob Elias, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, on this 28th day of July, 1998.



KATHRYN G.W. COWDERY